72-1385

April 16, 1973

ERRATA

NO. ~~A-907~~ 72-1385

IN THE

Supreme Court of the United States

WILLIAM EDWARD JEFFERY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ERRATA TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES NINTH CIRCUIT COURT OF APPEALS

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. On page 1, paragraph 1, line 4, January 19, 1973 should be corrected to read January 18, 1973.

. On page 15, after "Respectfully submitted By" it should read: ANTHONY SAVAGE, JR.
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. After Appendix A please ~~add the~~ attached Appendix B.

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William Edward Jeffery prays that a writ of certiorari issue to review the judgments of the United States Ninth Circuit Court of Appeals entered in the above matter on January 19, 1973 (petition for rehearing denied February 12, 1973).

I
CITATIONS TO OPINIONS BELOW

The original opinion of the United States Ninth Circuit Court of Appeals, is set forth in Appendix A hereto.

II
JURISDICTION

The judgment of the United States Ninth Circuit Court of Appeals was entered on January 19, 1973, and a petition for re-hearing was denied on February 12, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) and United States Supreme Court Rule 22 (1).

III
QUESTIONS TO BE ANSWERED

1. Was the petitioner denied a fair trial when the Trial Court admitted statements made by petitioner following illegal in-custody interrogation?

2. Was the petitioner denied a fair trial because his counsel was incompetent and ineffective?

IV
CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The constitutional provisions, statutes and court rules involved are the Sixth Amendment to the United States Constitution and Rule 52 (b) of the Federal Rules of Criminal Procedure.

The sixth amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascer-

tained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Rule 52(b) of the Federal Rules of Criminal Procedure is set forth in the footnote on page three of the U.S. Ninth Circuit Court of Appeals attached in the Appendix.

V

STATEMENT OF THE CASE

Petitioner was charged by Indictment, Cause No. 7-71D2, in the United States District Court for the Western District of Washington, Northern Division with possession of heroin claimed to have been committed on April 9, 1971, in violation of Title 21 U.S.C. § 174, Count I, and with conspiracy (Count II) connected with the offense in Count I herein, claimed to have been committed from January 1, 1971, through April of 1971, with one Jan R. Fuller and other unnamed, in violation of Sections 173 and 174 of Title 21 of the United States Code.

The petitioner waived his right to a trial by jury and the matter came on for trial before the Court on October 26, 1971. After nearly two full days of trial, the Court found the petitioner guilty of both Counts I and II of the Indictment. Thereafter, on the 31st of January, 1972, the Court pronounced judgment and the Judgment and Commitment was executed and filed on January 31, 1972. The Judgment and Commitment entered recited the following:

"It is adjudged that the defendant is guilty as charged in Counts I and II of the Indictment and as to such charges is hereby convicted.

It is adjudged that on Count I of the Indictment, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years.

It is adjudged that on Count II of the Indictment the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years.

Said sentence on Count II to run concurrently with sentence on Count I."

On January 31, 1972 petitioner filed Notice of Appeal to the Ninth Circuit Court of Appeals. On January 19, 1973 the Ninth Circuit affirmed the trial court. A copy of that Court's opinion is attached. On February 12, 1973 a Petition for Rehearing was denied by the Ninth Circuit and the mandate of the Court making the decision final was entered on February 20, 1973.

At the petitioner's trial, the Government called two witnesses who testified directly regarding the allegations contained in Count II of the Indictment described, supra. They were Jan Rollins Fuller (TR. 4-94, 122-190) and his wife, Barbara Lynn Fuller (TR. 190-207). Only Jan Rollins Fuller gave direct testimony regarding Count I of the Indictment. Both Jan Rollins Fuller and his wife were known addicts, having become addicted first to heroin and then methadone (TR. 85, 190, 191). In addition, Jan Rollins Fuller had been employed by the Bureau of Narcotics to serve as an informant for money compensation (TR. 54).

In the early morning hours of April 9, 1971, Special Agents of the Bureau of Narcotics were at the Seattle-Tacoma International Airport as a result of a tip that a known narcotics dealer named Joe Collin Catlin was to arrive from either Los Angeles or

San Francisco. This vigilance originated on April 8, 1971. The only description of Joe Catlin was that he was a Negro male, approximately 30 years of age (TR. 10).

Western Airlines Flight 652 landed at Sea-Tac Airport from Los Angeles, California, at approximately 3:30 A.M. on April 9, 1971. Among the passengers to deplane were the petitioner and the Government's main witness, Jan Rollins Fuller. However, petitioner and Jan Rollins Fuller were not together as they left the airplane and entered the airport terminal building. The Special Agents recognized Jan Rollins Fuller immediately from previous contacts that Fuller had made as an informer and at the trial testified that they were surprised to see Jan Rollins Fuller. A special agent maintained constant surveillance over petitioner from the time he disembarked from the airplane until he was arrested at the airport.

Sea-Tac International Airport at the time was undergoing extensive construction changes. Many of the newer completed facilities were not in use at that time. Among such facilities was a baggage claim area designated as D-3 which had three or four doors which would permit ingress and egress from that area. Above the baggage claim area was a temporary ramp that would allow one to view both the baggage claim area, D-3, and the area outside contiguous with it.

Petitioner, after disembarking from the airplane, descended the stairs leading to the baggage claim area designated D-3; he was shadowed by a special agent named Reedal (TR. 108, 118). Also, Jan Rollins Fuller went to the same baggage area. All were noticed and observed by an on duty airport security guard who was on the ramp approximately 15 feet

above the D-3 baggage claim area (TR. 108) and who saw all three men exit from the baggage claim area via the same door. Once outside, the following special agent and petitioner went in one direction and Jan Fuller went in another (TR. 118).

An observing airport security guard hollered that they were in a construction area and that they should return to the baggage claim area, D-3, and walk up the wooden stairs (TR. 17, 119). The petitioner and special agent complied, but Jan Fuller continued on in a northwesterly direction (TR. 119).

After leaving the baggage claim area, petitioner stopped at the men's restroom on the D Concourse; the following agent came in and also used the urinal next to the one being used by the petitioner. Shortly thereafter, Jan Fuller entered the restroom and went into an enclosed toilet. It was then that the petitioner was told to put both hands against the wall and to spread his legs. Special agents then searched petitioner and his bags. Next, petitioner was handcuffed (TR. 34, 74, 80, 112), and taken upstairs to the Airport Security Office where he was interrogated by a special agent who did not advise petitioner of his Miranda rights (TR. 65, 66). After interrogation, the handcuffs on the petitioner were removed and he was permitted to leave.

Jan Fuller, the State's main witness, also was handcuffed and taken to an office for interrogation (TR. 34, 59). There he was promised by a special agent that he would not be prosecuted if he showed where there was narcotics (TR. 60). Jan Fuller then revealed where he had hidden heroin. Based upon that information, special agents found heroin in a construction area outside of the building at baggage claim area D-3.

Petitioner was subsequently re-arrested on July

29, 1971, after return of an Indictment charging the offenses described above. Although petitioner refused to sign a waiver of his constitutional rights without first consulting with counsel, he was, nevertheless, interrogated (TR. 70).

At the trial, Jan Fuller and his wife testified that petitioner had discussed procurement of heroin at the residence of one Frddrhol Berrysmith. All witnesses who described Berrysmith's residence said it comprised small quarters with the room in which petitioner's discussion with Jan Fuller allegedly taking place being partitioned and particularly small. Other persons present at the time petitioner and Jan Fuller allegedly had these conversations testified that any conversations would necessarily be heard by all in the room and further, that no such conversations regarding procurement of heroin took place (TR. 248, 249, 259, 260).

Jan Fuller testified that petitioner went to California and Mexico to obtain heroin. Other witnesses called by the government testified that the petitioner had been to California and Mexico. Also witnesses testified that petitioner stayed in certain hotels and had been a passenger on certain specific airplane flights.

On the other hand, petitioner testified that Jan Fuller had invited him to join in forming a partnership to manufacture and sell water beds and "mod" clothing. The trips made by them were to gain information and make contacts in those fields of endeavor (TR. 273-275). (It should be noted at this point that this contradicts petitioner's statements during in-custody interrogation that he did not know Jan Fuller.) This fact was corroborated by two witnesses, Floyd Dugger and Henry S. Kemp (TR. 353-365). Neither of these witnesses appar-

ently had history of connection with drugs and, in fact, one was an established businessman.

Petitioner had never been accused of a crime prior to the Indictment referred to, supra. The record is void of any testimony indicating that petitioner had used or was using narcotic drugs. Moreover, even though Jan Fuller testified that petitioner in Mexico and California had heroin in his possession, none was found when petitioner was searched by Customs Inspectors at the Mexican-American Border (TR. 230) and by traffic officers in the State of California (TR. 212, 214, 218-224).

VI

REASONS FOR GRANTING THE WRIT

Question 1—Petitioner will not go into a lengthy discussion of the issue of petitioner being denied a fair trial when the trial court admitted into evidence statements made by petitioner (that he did not know his alleged co-conspirator) following in-custody interrogation. It is obvious from the record that petitioner was "in custody" at the time of his interrogation. Petitioner was continually questioned by Government Agents even after he refused to sign a waiver and demanded to speak to counsel before making any statements in clear violation of the Mandate of *Miranda vs. Arizona,* 384 U.S. 436 (1966). On page 3 of the opinion the Court of Appeals admitted that "the custodial interrogation at the airport was not prefaced by the Miranda warnings", and "the mandate of Miranda was not complied with after appellant's arrest in July either."

The Court of Appeals refused to reverse this conviction on the grounds that the clear violations of petitioner's constitutional rights as guaranteed by the Sixth Amendment to the United States Constitution and the Miranda decision were not raised by

petitioner's trial counsel and thus petitioner was foreclosed from raising this on appeal. This will be mentioned again under Question No. 2 regarding petitioner having been denied a fair trial because of incompetence and ineffectiveness of trial counsel. Suffice it to say at this point that Rule 52(b) of the Federal Rules of Criminal Procedure permit consideration of "plain errors or defects affecting substantial rights" for the first time on appeal. The violation of petitioner's Miranda and Fifth Amendment Rights ("Substantial Rights") are so "plain" that even the Court of Appeals conceded a clear violation. Thus the Court of Appeals is in error in not reversing this conviction and ordering a new trial.

Question 2—It is petitioner's contention that petitioner was denied a fair trial because of complete incompetence and ineffectiveness of trial counsel.

Petitioner contends that he was shackled with ineffective counsel both during the trial and during the sentencing following the court's verdict. The record is replete with instances where trial counsel appeared to be more interested in finishing the trial and other instances where he indicated directly that he lacked expertise in the field of criminal law. Prior to the sentencing procedure, the trial counsel requested leave to withdraw and be substituted by counsel who was standing in for the Lanning, Mahoney & Bryant law firm and with whom petitioner had never spoken. The substituted counsel was completely unprepared to represent the petitioner at the sentencing. For these reasons alone, petitioner was denied the right to a fair trial and his right to be represented by counsel at his sentencing respectively. During the trial, trial counsel made many acts of commission primarily through statements that indicated that he was ineffective in his representation

of the petitioner. Some of these instances are as follows:

TR 231, line 16:

"May I ask the clerk, we are on a pressed time schedule and I would like to ask if he has any more witnesses. I would like to limit our time to the usual 13 minutes so that we can really go ahead."

TR 245, line 10:

"Certainly, the action referred to in Count II, the testimony has been presented and is all hearsay, vague, contradictory; and as to Count I, upon which Count II is also based, it fails because of lack of proof."

"I won't go into an extended discussion at this time in reviewing a lot of facts and so on. I would imagine that the Court would hesitate to dismiss it on challenge."

"However, I feel that there are so many holes in the case, and so many statements that are untrue, and basic substantial facts proven untrue by the government's own witnesses, that this case falls, regardless of the testimony of Jan Fuller and Barbara Fuller. However, I don't want to go into that at this time, but I want the record to thoroughly reflect that I and I and I think the court realized in hearing that the testimony and the evidence—what I mean by that."

TR 276, line 20:

"I am wondering, your Honor, whether we will have time to go through all this by noon tomorrow."

"The Court: How many more witnesses do you have, Mr. Vertries?"

"Mr. Vertries: I have two witnesses at least that will not take too long but in going through all this to put Mr. Jeffery, I know it is going to

take a good hour, or better."

"Maybe I can shorten it up and guess all we can do is try."

TR 283, line 20: (To petitioner)
"Q. And to date you have not been able to pay me any fee—is that right?

A. That is right."

TR 371, line 22:
"In view of time and so on I will not go into a lot of detail.

I asked general questions of Mr. Jeffery on many of the trips to shorten this up . . ."

TR 376, line 15:
". . . , and I don't defend many criminal cases any more, because I try to confine my practice to civil practice, but every so often I take one or two or a few cases, especially the last three years, because of some of the instances I have seen, like this one, that really make me boil."

TR 386, line 12:
"I indicated to the court before I want to take a minute or two on the motion for new trial and after that I would like permission to withdraw as attorney for the defendant and the firm of Lanning, Mahoney & Bryant would be counsel of record and Mr. John Newkirk is appearing on their behalf this morning."

TR 388, line 8:
"Those points alone, if nothing else, in my mind are sufficient to consider by the court that all the evidence and testimony wasn't brought out or couldn't be brought out for various reasons, lack of funds mainly, for one thing, and, if I was a philanthropist, or someone like Melvin Belli of F. Lee Bailey, with lots of money and a private plane, I would be in a position to do something, I feel there is a lot of things in this

> in addition to what came before the court that in all fairness to the defendant I feel that it would be to the interest of justice to grant a new trial in this matter."

As indicated earlier, at the sentencing petitioner was represented by counsel whom he had never seen and who had never before appeared on his behalf. It was indicated at the sentencing that Lanning, Mahoney & Bryant would be counsel of record and that Mr. John Newkirk was appearing on their behalf. The trial counsel then was permitted to withdraw as reflected by pertinent dialogue which appears as follows:

> "Mr. Newkirk, are you prepared?
>
> Mr. Newkirk: Your Honor, I have no prepared substitution of attorney. I did come here for Bill Lanning as counsel of his firm, to inform the court that his firm would be handling the appeal and, if possible, a continuance; and I did hear the court's very brief remark in the beginning that no continuance would be granted."

Mr. Newkirk also requested a continuance so that Mr. Lanning could review the transcript and renew the motion for a new trial, but that motion was denied. Mr. Vertries, trial counsel, indicated to the court that he himself had never seen the report of the probation department.

Sentencing is as important as any other phase of criminal proceedings and unless clearly waived, failure to provide counsel at sentencing is in violation of the Sixth Amendment to the United States Constitution. *McConnell v. Rhay,* 89 S.Ct. 32, 393 US. 2, 21 L.Ed.2d 2; *Mempa v. Rhay,* 390 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336.

In the instant case, the petitioner had an honorable discharge from the service and had never been

in any trouble with the authorities prior to this incident. A report was prepared by the Probation Department for the court's use but neither a defense, trial or sentencing counsel had reviewed the report. Indeed, the counsel of record at the time of sentencing was standing in for the new firm representing the petitioner and knew nothing about the case nor of the petitioner. Since this motion for continuance to enable new counsel to review the record for the purpose of making an argument for a new trial was denied, certainly some time should have been granted so that the new counsel could prepare pre-sentence information for the court on behalf of the petitioner. This having been denied, the petitioner was denied due process, and right to counsel. *McConnell v. Rhay* and *Mempa v. Rhay,* supra.

Petitioner can find no United States Supreme Court case defining the guidelines by which lower courts are to judge whether incompetency of trial counsel results in a denial of "counsel" as guaranteed by the Sixth Amendment and the United States Courts of Appeal are in conflict with State decisions on this issue, thus compelling the necessity of the Supreme Court granting petitioner's Writ and establishing guidelines for the future.

Due process requires that defendant charged with having committed a felony be allowed representation by counsel. *Gidion vs. Wainwright,* 372 U.S. 335 (1963). The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense." This should be interpreted to mean "effective" counsel for his defense. If his counsel during the trial, proves to be incompetent then Due Process has not been satisfied.

The Ninth Circuit Court of Appeals, as other courts of appeals, has ruled that the test, in dealing with the contention that trial counsel was inadequate or incompetent is, whether or not, what the accused's counsel did or did not do made the trial a "farce" and a "mockery of justice" which shocks the conscience of the Court. *Peek vs. U.S.*, 321 F.2d 934 (9th Cir., 1963). The attorney's conduct of the trial must turn the case into a "sham". *Sims vs. Lane,* 411 F.2d 661 (8th Cir., 1967).

On the other hand some states use a more liberal, less exacting test. In the State of Washington (as opposed to the more exacting test in the 9th Circuit) the test is: Does the record, as a whole, show that the accused was accorded a fair and impartial trial. *State vs. Roberts,* 69 Wn.2d 921, 421 P.2d 1014 (1966).

Petitioner urges the Court to accept the more liberal view. As stated in *Glasser vs. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942):

> " . . . The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."
>
> "We think it is further true that the right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial . . . ."
>
> "A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the *effective* assistance of counsel, or

any other element of due process of law without which he cannot be deprived of life or liberty." (Emphasis added).

Petitioner contends he was denied a fair trial on he grounds of complete incompetency and ineffeciveness of counsel. The record, as set forth herein, s ample evidence that petitioner, for all practical urposes, was tried with no counsel at all. Even the Ninth Circuit Court of Appeals recognized that etitioner's constitutional rights were severely inringed by investigating officers, all of which went nnoticed by trial counsel. Therefore, petitioner espectfully urges this Court to grant this petition nd fully review this case and resolve the conflict mong lower courts regarding the question of inufficiency of counsel amounting to a denial of a onstitutionally conducted trial, and reverse petiioner's conviction and order a new trial.

Respectfully submitted,

By.....

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